FILED
MAY 16 1955
HAROLD B. WILLEY, Clerk

No. [redacted] 81

IN THE

Supreme Court of the United States

October Term, 1954

JACOB LICHTER and JENNIE L. LICHTER,
individually and as partners doing business as
SOUTHERN FIREPROOFING COMPANY,
Petitioners,

v.

UNITED STATES OF AMERICA
and
SECRETARY OF THE ARMY,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS IN AND FOR THE DISTRICT OF COLUMBIA

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Section 403 (i) (1) (F) exempts subcontracts from renegotiation which were under prime contracts with the Department of the Government awarded as a result of competitive bidding for the construction of buildings and facilities. Section 701 (d) provides that Section 403 (i) (1) (F) shall be effective as if it had been in Section 403 "on the date of its enactment," viz, on April 28, 1942, which was the original enactment date of Renegotiation legislation.

Hence, Petitioners' said subcontracts are exempted from renegotiation.

The Courts below refused to so hold and in doing so, interpreted this important and far-reaching statute against its plain words and meaning and nullified the "effective date" clause of Section 701 by unwarranted construction of the legislative history of the Renegotiation Act.

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UNITED STATES OF AMERICA
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Respondents.

PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS IN AND FOR THE DISTRICT OF COLUMBIA

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioners, Jacob Lichter and Jennie L. Lichter, respectfully pray, for reasons good and sufficient as hereinafter stated, that a Writ of Certiorari issue to review an order entered March 24, 1955 by the United States Court of Appeals in and for the District of Columbia, in Cause No. 11,925 on its records, which said order affirmed the Tax Court of the United States which had theretofore entered an order against petitioners.

OPINIONS BELOW AND GROUNDS OF JURISDICTION

The opinion of the Tax Court of the United States in the within matter was promulgated on May 27, 1953 and is reported in 20 T. C. 461. A copy of said opinion is contained in the "Joint Appendix," as printed for use in the court below at page 29; said "Joint Appendix" has been filed in this court.

The opinion of the Court of Appeals for the District of Columbia is dated March 24, 1955; a copy thereof is appended hereto. Judgment was entered in accordance with said opinion.

Jurisdiction is conferred in this Court by virtue of 62 Stat. 961, amended May 24, 1949, c. 139 Para. 106, 63 Stat. 104, 28 U. S. C. A. Section 2101.

STATEMENT OF QUESTION PRESENTED

Whether, as a matter of law, Petitioners' subcontracts for the calendar year 1942 are exempt from renegotiation for the year 1942 by virtue of Section 403 (i) (1) (E) and (i) (1) (F) of the Renegotiation Act of 1943.

STATUTE INVOLVED

The sole statute involved is the Renegotiation Act of 1943 (Act of February 25, 1944, Public Law 235, 78th Cong., 2d Sess., 58 Stat. 21). Section 403 (i) (1) (E) and (i) (1) (F) thereof read as follows:

> "The provisions of this section [i. e., Section 701] shall not apply to—
>
> (E) Any contract with a Department, awarded as a result of competitive bidding, for the construction of any building, structure, improvement or facility; or

(F) Any subcontract, directly or indirectly under a contract or subcontract to which this section does not apply by reason of this paragraph."

Section 701(d), entitled "Effective Date," reads as follows:

"The amendments made by subsection (b) (of the Revenue Act, viz., Section 403 supra) shall be effective only with respect to the fiscal years ending after June 30, 1943, *except that* (1) the amendments inserting subsections (a) (4) (C), (a) (4) (D), (i) (1) (C), (i) (1) (D), (i) (1) (F), (i) (3) and (1) in Section 403 of the Sixth Supplemental National Defense Appropriation Act 1942, *shall be effective as if such amendments and subsections had been a part of Section 403 of such Act on the date of its enactment,* and (2) the amendments adding to subsection (d) and (e)(2) to Section 403 of such Act shall be effective from the date of the enactment of this Act." (Emphasis ours.)

The framework of the Renegotiation Act showing the relationship of the foregoing quoted section is indicated by the following abbreviated skeleton:

"Section 701
(a) Terms used . . .
(b) Section 403 . . . is amended to read
(a) . . .
(b) . . .
(c) . . .
(d) . . .
(e) . . .
(f) . . .
(g) . . .
(h) . . .
(i) . . .
(1) . . .
(E) . . .
(F) . . . .
Section 701 (c)
Section 701 (d)."

It should be noted that "Section 403" is in fact a part of Section 701 of the Revenue Act: it is actually Section 701, subsection (b).

Therefore, when "403 (i) (1) (E)" and "403 (i) (1) (F)" are referred to hereafter, it is in fact a reference to Section 701, subsection (b), and in full would read Section 403, subsection (i), paragraph (1), subparagraph (F).

STATEMENT OF FACTS

The Petitioners reside in Cincinnati, Ohio, and during the calendar year of 1942 did business there as partners under the firm name of Southern Fireproofing Company.

On October 20, 1944, a unilateral order (Joint Appendix, p. 12) was issued by the then Secretary of War which held and determined that Petitioners, as a result of the performance of certain subcontracts, had realized excessive profits of $70,000 during the calendar year of 1942. The Petitioners did not agree with the determination of the Secretary of War, and did not file a petition for review with the Tax Court within the 90 days prescribed by law; and did not pay the sum set forth in the unilateral order at such time (Stipulation; Joint Appendix, p. 19).

Thereafter when the payment called for in the order was not made, a suit was filed in the United States District Court, Southern District of Ohio, Western Division, by Respondent here, the United States of America, to collect the sums allegedly due under said unilateral order.

In the District Court Petitioners challenged the constitutionality of the Renegotiation Act, as it related to them, and alleged and set up certain other defenses, among which was that the subcontracts involved were exempt from renegotiation by virtue of Section 403 (i) (1) (E) and (i) (1) (F) of the Renegotiation Act of 1943.

The District Court rendered judgment against the Petitioners and ruled that said Renegotiation Act was con-

stitutional and that said court was without jurisdiction to hear the further defenses of Petitioners because the Tax Court had exclusive jurisdiction of such matters (68 Fed. Supp. 19).

Upon appeal of said judgment by Petitioners, the judgment of the District Court was affirmed by the United States Court of Appeals for the Sixth Circuit (160 Fed. (2d) 329) and by the United States Supreme Court (334 U. S. 742), Mr. Justice Douglas writing a separate opinion. Thereafter Private Law 1057-81st Congress (Chapter 1150, 2d Session, S.4111) entitled "An Act for the Relief of Southern Fireproofing Company of Cincinnati, Ohio" was passed and this suit is brought under the authority of said law (Joint Appendix, p. 11).

Subsequent to the filing of the within case in the Tax Court of the United States the Petitioners and Respondents agreed upon and filed a Stipulation (Joint Appendix, p. 18), contained in which was a stipulation that Petitioners realized an additional amount of $6,800 of excessive profits for the calendar year 1942, making the amount of excessive profits to which Petitioners are liable, if liable at all, to be the sum of $76,800.

The Petitioners subcontracts involved were subcontracts under prime contracts (Joint Appendix, p. 20) with the War Department for the construction of buildings and other facilities (Joint Appendix, p. 20).

All of the prime contracts involved were renegotiated (Exhibit C; Joint Appendix, p. 28).

Section 403 (i) (1) (E) requires that the prime contracts be awarded as a result of competitive bidding if the subcontracts referred to in (i) (1) (F) are to be exempt. Whether the prime contracts were competitive in fact (with two exceptions which the Stipulation determines were not competitive) was at issue in the Tax Court and the matter was fully argued and briefed. The Tax Court

decided the case without reference to this issue but as though the prime contracts were in fact awarded as a result of competitive bidding. It is proper therefore to assume that the prime contracts were so awarded (*United States* v. *Pugh*, 99 U. S. 265, 267, 270; *United States* v. *Wells*, 283 U. S. 102, 111, 120); save the two exceptions. The two exceptions are of no consequence because if these two prime contracts and the subcontracts involved thereunder constitute the only negotiable business, Petitioners are not renegotiable because these two contracts are only $59,000 in principal amount and thus Petitioners are under $100,000 renegotiable business which gives them an exemption otherwise. This is agreed to by Respondents (see Par. 26 of the Stipulation; Joint Appendix, p. 24).

At the argument in the Court of Appeals (the court below) the jurisdiction of the court was raised. Upon consideration and on the basis of *United States* v. *California Eastern Line, Inc.*, Supreme Court No. 263, 23 U. S. Law Week 4116, there being no question of amount of excessive profits involved, the court sustained its jurisdiction over the cause, but said:

> "On the merits of that [this] controversy, however, we affirm for the reasons set forth in the decision of the Tax Court, *Lichter* v. *United States*, 20 T. C. 461."

The Court of Appeals therefore adopted the reasoning of the Tax Court, and, as a result, confirmed Petitioners' contention that it is proper to assume that the prime contracts involved (with the two exceptions noted) were in fact competitive. Admittedly, Petitioners' subcontracts were subcontracts for a Department of the Government, which said prime contracts were for the construction of buildings and facilities.

The sole issue, therefore, is (and was in the two courts below) whether Petitioners' subcontracts involved are

exempt from renegotiation as a matter of law within the meaning of the applicable provisions of the Renegotiation Act, all factual considerations having been decided or assumed in Petitioners' favor.

SUMMARY OF ARGUMENT

Section 403 (i) (1) (F) exempts subcontracts from renegotiation which were under prime contracts with the Department of the Government awarded as a result of competitive bidding for the construction of buildings and facilities. Section 701 (d) provides that Section 403 (i) (1) (F) shall be effective as if it had been in Section 403 "on the date of its enactment," viz., on April 28, 1942, which was the original enactment date of Renegotiation legislation.

Hence, Petitioners' said subcontracts are exempted from renegotiation.

The Courts below refused to so hold and in doing so, interpreted this important and far-reaching statute against its plain words and meaning and nullified the "effective date" clause of Section 701 by unwarranted construction of the legislative history of the Renegotiation Act.

Thus the cause is one peculiarly within the supervisory powers of this Court.

ARGUMENT

As pointed out hereinabove, the subcontracts involved were subcontracts under prime contracts for a Department of the Government, which said prime contracts were awarded as a result of competitive bidding for the construction of buildings and facilities.

The Plain Meaning and Literal Wording of the Statute Has Been Violated.

The original legislation comprising the Renegotiation Act made all contracts in principal amount of more than $100,000.00 renegotiable (Act of April 28, 1942; Public Law 528, 77th Cong., 2d Sess., 56 Stat. 226, 245). Later, upon the first amendment of the Act (Act of October 21, 1942, Public Law 753, 77th Cong., 2d Sess., 56 Stat. 798, 982), certain contracts were made exempt, and the Secretary of the applicable Department was authorized to exempt certain others as of and related back to April 28, 1942.

Then in the final legislation applicable here (Act of February 25, 1944, Public Law 235, 78th Cong., 2d Sess., 58 Stat. 21, 78) subcontracts under competitive prime contracts with a Department of the Government for the construction of buildings and facilities *were exempted as of and related back to April 28, 1942*, as though the exemption "had been a part of Section 403 [as above] on the date of its enactment" [Section 701 subsection (d) of the Revenue Act of 1943].

403 (i) (1) (E) and (F) provide:

> "The provision of this section shall not apply to—
> (E) Any contract with A Department, awarded as a result of competitive bidding, for the construction of any building, structure, improvement of facility; or
> (F) Any subcontract, directly or indirectly under a contract or subcontract to which this section does not apply by reason of this paragraph."

Section 701, subsection (d), the "Effective Date" provision of the Revenue Act of 1943, provides:

> "The amendments made by subsection (b) shall be effective only with respect to the fiscal years ending after June 30, 1943, *except that* (1) the amendments inserting subsections (a) (4) (C), (a) (4) (D), (i) (1) (C), (i) (1) (D), (i) (1) (F), (i) (3) and (1) in Section

403 of the Sixth Supplemental National Defense Appropriation Act 1942, *shall be effective as if such amendments and subsections had been a part of Section 403 of such Act on the date of its enactment,* and (2) the amendments adding to subsection (d) and (e) (2) to Section 403 of such Act shall be effective from the date of the enactment of this Act." (Emphasis ours.)

It is to be noted that Section 701 (d) provides that it shall take effect only with respect to fiscal years commencing after July 1, 1943, *except* that the amendment inserting (i) (1) (F) shall be effective as if (i) (1) (F) had been a part of Section 403 of the Act "on the date of its enactment," which was April 28, 1942. Or, to put it another way: Section 701 (d) says that (i) (1) (F) is to be considered as always having been in the Act. To put it still another way: Section 701 (d) says that subcontracts under competitive construction contracts with a Department of the Government shall be considered as always having been exempt.

Now, if (i) (1) (F) had been, as provided above, a part of Section 403 on April 28, 1942, could it have been dependent on (i) (1) (E) as erroneously held by the Courts below? No, because (i) (1) (E) did not become effective until July 1, 1943. *Hence,* the exemption of subcontracts could not have been dependent on the exemption of the prime contracts.

It is evident further that the decisions of the Courts below, if followed, would render (i) (1) (F) ineffective from April 28, 1942 to July 1, 1943. It must be presumed that Congress did not mean to render its exception meaningless; and, we submit, unless the Court gives it effect from April 28, 1942, adopting Petitioners' view, it has no meaning.

It is the holding of the Courts below that because (i) (1) (E) relates back to July 1, 1943, then (i) (1) (F) is

related back only to that date, despite the clear and succinct language of the "effective date" provision, Section 701 (d), which provides that (i) (1) (F) "shall be effective as if such amendments and subsections had been a part of Section 403 of such Act on the date of its enactment" (April 28, 1942). Congress here clearly desired subcontracts to be exempt, back to April 28, 1942, and prime contracts to be exempt only from July 1, 1943.

The end result of this—if not reversed—would be to cancel (i) (1) (F) out of the effective date provisions of 701. The Court will note that (i) (1) (E) is not set forth in that part of the statute and if it is head that (i) (1) (F) does not relate back to April 28, 1942, as the statute says, then it is eliminated from the operation of the exception clause. This obviously should not be done, not only because it would be an interpretation against the plain words and meaning of 701, but it would nullify the exception clause and the legislative intention to make an exception of (i) (1) (F) relating to subcontracts with a Department of the Government.

Petitioners' View Is Supported by the Legislative History of the Renegotiation Act.

That the contention of Petitioners is correct is further shown by the Senate Report on the Revenue Bill of 1943 (Report No. 627; 78th Cong., 1st Sess.); the House Report (Report No. 871; 78th Cong., 1st Sess.); and the Conference Report in the House of Representatives (Report No. 1079; 78th Cong., 1st Sess.). The Senate Report (Report No. 627) states as follows (page 100):

> "3. SUBCONTRACTS UNDER EXEMPT CONTRACTS OR SUBCONTRACTS [Subsec. (i) (1) (E) of the House Bill].
>
> "Under existing law, considerable confusion results from the fact that a *subcontract* may be subject to renegotiation even though the prime contract or any

intermediate subcontract may not be so subject. *The House Bill exempted such contracts as were directly or indirectly under an exempt contract or subcontract.*

"The exemption in the House Bill went to contracts and subcontracts exempted from the provisions of the renegotiation section and to those to which that section was inapplicable by reason of paragraph (1) of subsection (i). Under the committee bill, *the* exemption is restricted to contracts and subcontracts to which the renegotiation section is made inapplicable by the paragraph.

"There is an important difference between the House and the committee bill in this respect, further, in that the committee bill makes the *exemption* retroactive to April 28, 1942. The House exemption applied only to amounts received or accrued under such contracts or subcontracts in fiscal years of the contractor or subcontractor ending after June 30, 1943." (Emphasis ours.)

It is important to note that the foregoing relates to or deals with subcontracts only. Observe the heading itself: "Subcontracts Under Exempt Contracts or Subcontracts." The prime contract exemption is taken up separately at another place in the Report (Report No. 627, p. 103). The difference between the House and the Senate bills are shown to be: the House bill proposes to exempt only subcontracts under exempt prime contracts and subcontracts. The House Report (Report No. 871) states this, as follows (page 79):

"3. SUBCONTRACTS UNDER EXEMPT PRIME CONTRACTS OR SUBCONTRACTS.

"Under existing law, considerable confusion results from the fact that a subcontract may be subject to renegotiation even though the prime contract or any intermediate subcontract may not be so subject. *The bill exempts such subcontracts as are directly or indirectly under an exempt contract or subcontract.*" (Emphasis ours.)

Thus, the House bill proposed to exempt only subcontracts under prime contracts which were exempt. The House bill further made both prime contracts and subcontracts exempt from July 1, 1943. The Senate bill treated the two separately and related the subcontracts back to April 28, 1942.

The fact that separate treatment was given to subcontracts on the one hand and prime contracts on the other, is a denial that 403 (i) (1) (F) may only apply if the prime contract was itself exempt as of April 28, 1942. To make the exemption of the prime contract a condition precedent to the exemption of a subcontract is impossible once the two are treated separately.

The only inquiry remaining is to ascertain how the difference in the two bills was resolved. A summary of House and Senate actions follows:

The Conference Report of the House (Report No. 1079, p. 36) first took up the competitive construction contract general exemption which had not been contained in the House bill at all; the House agreed to the Senate amendment, thus agreeing that the present 403 (i) (1) (E) should be in the final bill. This Conference Report in this respect is as follows:

> "*Amendment Numbered 295.* That the House recede from its disagreement to the amendment of the Senate Numbered 295, and agree to the same with an amendment as follows: on page 96, line 17, of the Senate Engrossed Amendments, strike out '(F)' and insert (E); and the Senate agree to the same."

This put the provision requiring that prime contracts be competitive in the bill. Amendment No. 296 renumbered the subcontract exemption [403 (i) (1) (F)] and inserted it in the final bill. Then came Amendment Numbered 297. What was accomplished by Amendment Numbered 297 is explained in the "Statement of the Managers [of the

Conference] on the Part of the House" (Report No. 1079, p. 85), as follows:

> "*Amendment Numbered 297:* Under the provisions of subsection (i) (1) (G) of the Renegotiation Act, as amended by the House bill, any subcontract directly or indirectly under a contract or subcontract exempted from the provisions of the act, or to which the act does not apply by reasons of subsection (i) (1) thereof, is exempt; this amendment limits the exemption of such subcontracts under subsection (i) (1) (K) to those which are directly or indirectly under contracts or subcontracts to which the Renegotiation Act does not apply by reason of subsection (i) (1). *The House recedes.*"

Thus, the House bill's proposal that only subcontracts under exempt contracts be exempt *was receded from,* and the Senate's separate treatment of subcontracts was adopted.

Finally, Amendment Numbered 309 of the Conference Report shows that the House receded and agreed to the Senate's proposals, namely, that the exemptions of competitive subcontracts only under 403 (i) (1) (F) relates back to April 28, 1942, even though the prime contracts therefor under 403 (i) (1) (E) are exempt from July 1, 1943. In the "Statement of the Managers (of the Conference) on the Part of the House" (Report No. 1079), this is clear. On page 88 the effective date provision is discussed. The Managers state:

> "*Amendment Numbered 309:* This amendment relates to the effective dates of various provisions. *The House recedes* with amendments."

Hence the House agreed to relate the exemption for competitive subcontracts for the construction of a building or facility back to April 28, 1942, as contained in the Senate proposal.

Respondents and the Courts below disagreed with the foregoing interpretation of the legislative history. Petitioners submit that what has been stated above accurately reflects the legislative intention and substantiates their contention as to the exemption to which their subcontracts are entitled, but the Court need not be reminded that whatever that history seems to show, the legislation says what it says, and meanings that are not there cannot be read into it. As we have pointed out above, Section 701 (d) has no meaning *unless* the exemption is applied to (i) (1) (F) from April 29, 1942, the date of the enactment of the original provisions of the Act. Respondents argue that there is no indication that Congress intended subcontracts to be exempt when the primes were not. We challenge this because the statute itself, Section 701 (d), *definitely says* that (i) (1) (F) shall be effective as though it had been in the Renegotiation Act from the date of its enactment. And, as we have said, if the Court may not exempt Petitioner's subcontracts here, (i) (1) (F) is not effective from April 28, 1942, "the date of its enactment."

Respondents, however, have an "even if" argument, *although it was not concurred in by the Tax Court below.* It is said by Respondents that "even if" the language of the statute doesn't mean what they contend for, the Regulations resolve any doubt because the Regulations have the force and effect of law. Petitioners do not argue that Regulations do not have the force and effect of law, but that regulations that have the force and effect of law must be *valid* regulations. A regulation issued pursuant to Congressional authority must stay within the confines of the grant. In other words, the regulations cannot be such as to *change* the law. Although an administrative interpretation is entitled to weight (*Burnet* v. *Chicago Portrait Co.*, 285 U. S. 1), it is not a "power to make law but power to adopt regulations to carry into effect the will of Congress as expressed by the statute" and the regulation must be

"in harmony with the statute and must be reasonable" (Syllabi; *Manhattan General Equipment Co.* v. *Commissioner*, 297 U. S. 129).

We believe that the Court could not and may not permit an administrative regulation to render meaningless the plain wording of Section 701 (d).

CONCLUSION: A WRIT OF CERTIORARI SHOULD ISSUE

The questions here involved are of considerable importance, not only because Petitioners have at stake a sum of money not inconsiderable in amount, but because the Court should always use its supervisory powers to assure correct interpretation of the law so that the legislative intent may be carried. Truly, great vigilance should be exerted in the exercise of this function of the Court. Accordingly, for the reasons stated, Petitioners urge that a Writ of Certiorari should issue.

Respectfully submitted,

May 1, 1955

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APPENDIX

APPENDIX

Opinion of the Court Below

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11925

JACOB LICHTER, ET AL., individually and as partners d/b/a Southern Fireproofing Co., PETITIONERS

v.

UNITED STATES OF AMERICA and SECRETARY OF THE ARMY, RESPONDENTS

On Petition for Review of Decision of The Tax Court of the United States

---

Decided March 24, 1955

Mr. Paul W. Steer for petitioners.

Messrs. Melvin Richter, Attorney, Department of Justice, of the bar of the Supreme Judicial Court of Massachusetts, *pro hac vice,* by special leave of Court, and *James H. Prentice,* Attorney, Department of Justice, of the bar of the Court of Appeals of New York, *pro hac vice,* by special leave of Court, with whom *Mr. Paul A. Sweeney,* Attorney, Department of Justice, was on the brief, for respondents. *Messrs. Edward H. Hickey* and *Frederick N. Curley,* Attorneys, Department of Justice, also entered appearances for respondents.

Before WILBUR K. MILLER, BAZELON and FAHY, Circuit Judges.

PER CURIAM: After this case was heard by our court it remained undecided until now because of the pendency

of *United States* v. *California Eastern Line, Inc.*, —— U. S. ——, which we anticipated would clarify the scope of our jurisdiction to review decisions of the Tax Court of the United States in renegotiation cases. The Supreme Court has now held in the above case that a decision of the Tax Court that a particular contract was not renegotiable is not within the exclusive jurisdiction of the Tax Court "by order, to finally determine the amount, if any, of such excessive profits," which "shall not be reviewed or redetermined by any court or agency."[1] The Court held such a decision falls within the broad grant of jurisdiction to Courts of Appeals, contained in § 1141 of the Internal Revenue Code, "to review the decisions of the Tax Court."[2]

In the instant case no dispute is before us as to the amount of excessive profits, assuming the contract out of which the profits arose was renegotiable, as the Tax Court held. Petitioners, contending to the contrary, say the contract was exempt from renegotiation by § 403(i)(1)(F) of the Renegotiation Act of 1943,[3] and § 701(d) of the Revenue Act of 1943.[4] As we interpret *United States* v. *California Eastern Line, Inc., supra,* the order of the Tax Court resolving the controversy over the renegotiable status of the contract is within our review jurisdiction under § 1141.

On the merits of that controversy, however, we affirm for the reasons set forth in the decision of the Tax Court, *Lichter* v. *United States,* 20 T. C. 461.

Affirmed.

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[1] § 403(e)(1) of the Renegotiation Act, 56 Stat. 245, as amended, 58 Stat. 86, 50 U. S. C. A. App. § 1191(e)(1).

[2] 53 Stat. 164, as amended, 26 U. S. C. § 1141(a) (1952). See, also, § 7482 of the Internal Revenue Code of 1954 (68A Stat. 890).

[3] 58 Stat. 78, 88, as amended, 50 U. S. C. A. App. § 1191 (i)(1)(F) (enacted as § 701(b) of the Revenue Act of 1943, 58 Stat. 21 *et seq*).

[4] 58 Stat. 21, 92.

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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 800

JACOB LICHTER AND JENNIE L. LICHTER, INDIVIDUALLY AND AS PARTNERS, D/B/A SOUTHERN FIREPROOFING COMPANY, PETITIONERS

v.

UNITED STATES OF AMERICA AND SECRETARY OF THE ARMY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the Tax Court of the United States (R. 29-37) is reported at 20 T.C. 461. The opinion of the United States Court of Appeals for the District of Columbia Circuit (Pet. App. 1a-2a) is unreported.

JURISDICTION

The judgment of the Court of Appeals was entered on March 24, 1955 (R. 38). The petition for a writ of certiorari was filed on May 16, 1955. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether Sections 403(i)(1) and 701(d) of the Second Renegotiation Act exempt from renegotiation petitioners' construction subcontracts for 1942, let under prime contracts which were themselves renegotiable.

STATUTE INVOLVED

The pertinent provisions of the Second Renegotiation Act, Title VII of the Revenue Act of 1943, Act of February 25, 1944, 58 Stat. 21, 78, 50 U.S.C. App. 1191, are set forth in the Appendix, *infra*, pp. 12-14.

STATEMENT

During the calendar year 1942, petitioners held, and performed work on, subcontracts under prime contracts for the construction of parts of several Army camps, primarily Camp McCoy, Wisconsin, and Camp Breckenridge, Kentucky (R. 20-23). Each of the prime contractors has been renegotiated under the wartime Renegotiation Act (R. 28).

In October 1944, the Under Secretary of War issued a unilateral order determining that petitioners had realized, under these subcontracts, $70,000 in excessive profits for the year 1942 (R.

12-14). Petitioners filed a timely petition in the Tax Court for redetermination of their 1942 excessive profits (R. 6-10).[1] The petition claimed that the Under Secretary's determination was invalid because their subcontracts were under prime construction contracts which had been awarded as a result of competitive bidding, and were therefore exempt from renegotiation by virtue of Section 403(i)(1)(F) and 701(d) of the Second Renegotiation Act, *infra*, pp. 12-14 (R. 9). Following respondents' answer (R. 15-17), the case was submitted on a stipulation of facts (R. 18-27).

In its opinion and order entered in May 1953, the Tax Court rejected petitioners' contentions and decided that petitioners' excessive profits for 1942 were in the amount of $76,800 (R. 37).[2] Pointing out that the prime contracts under which petitioners' subcontracts were let were themselves subject to renegotiation since the exemption for

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[1] The petition, although filed in January 1951, was timely by virtue of Private Law No. 1057, 81st Cong., 2d Sess. (R. 11). Petitioners had sought the enactment of this private law following this Court's rulin ?, in the collection suit brought by the Government, that petitioners' failure to invoke the Tax Court remedy precluded consideration of their attack on the correctness of the Under Secretary's determination. *Lichter* v. *United States*, 334 U.S. 742, 792.

[2] Paragraph 29 of the stipulation provided that, if the Tax Court held against petitioners and if petitioners were also unsuccessful in their appeal from another Tax Court decision in an income tax matter, the Tax Court should increase petitioners' excessive profits from $70,000 to $76,800 (R. 26). Since the Court of Appeals for the Sixth Circuit decided the income tax case against petitioners (*Lichter* v. *Commissioner of Internal Revenue*, 201 F. 2d 49 (C.A. 6), certiorari denied, 345 U.S. 942), the Tax Court increased the amount of excessive profits in accordance with the stipulation.

competitively awarded construction contracts (contained in Section 403(i)(1)(E), *infra*, p. 13) was effective only as to fiscal years ending after June 30, 1943 (Section 701(d), *infra*, p. 14), the Tax Court held that petitioners' claim that their subcontracts were nevertheless exempt from renegotiation under Section 403(i)(1)(F), *infra* p. 13, was without support either in the language or legislative history of that provision (R. 34-36). "Congress clearly intended that only such subcontracts be exempt as were let under prime or intermediate contracts which were exempt" (R. 36). The court below affirmed "for the reasons set forth in the decision of the Tax Court" (Pet. App. 2a).

ARGUMENT

Petitioners seek further consideration of their contention that under Sections 403(i)(1)(F) and 701(d) of the Second Renegotiation Act their construction subcontracts for the calendar year 1942 were exempt from renegotiation even though the prime contracts were not so exempt. Both courts below properly rejected this claim as not supported by the language or legislative history of the Act. Moreover, the issue sought to be raised is not of general importance; it is not involved in any of the renegotiation cases still pending. Accordingly, there is no warrant for review by this Court.

1. *The Statute.* As amended by the Second Renegotiation Act of February 25, 1944 (cf. *Lichter* v. *United States*, 334 U.S. 742, 745), Section 403(i)(1) of the Renegotiation Act set forth six classes of

agreements exempt from renegotiation, some of which were carried forward from the Act as it previously stood and some newly added. Included in the new exemptions were the following (*infra*, p. 13):

> (E) any contract with a Department, awarded as a result of competitive bidding, for the construction of any building, structure, improvement, or facility; or
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> (F) any subcontract, directly or indirectly under a contract or subcontract to which this section [Section 403, *i.e.*, the Renegotiation Act] does not apply by reason of this paragraph [Section 403(i)(1)].

Section 701(d) of the Second Renegotiation Act, *infra*, p. 14, provided that subparagraph (E) should be effective only with respect to fiscal years ending after June 30, 1943, but that subparagraph (F) should be retroactive to April 28, 1942, the date of enactment of the original Renegotiation Act.

Petitioners seek to argue from this difference in effective dates that while Congress intended that prime construction contracts covered by Section 403(i)(1)(E) should be exempt only from July 1, 1943, it intended by Section 403(i)(1)(F) that subcontracts let under non-exempt prime construction contracts, such as those here involved, were to be exempt retroactively from April 28, 1942 (Pet. 7-14). But this contention has no textual basis. Since the prime contracts, even though construction contracts, are admittedly not

exempt under Section 403(i)(1) because Section 403(i)(1)(E) does not apply to such 1942 prime contracts, it must follow that petitioners' subcontracts are not exempted by Section 403(i)(1)(F) for they plainly do not fulfill the statutory terms; they are *not* under a contract or subcontract to which the Renegotiation Act is inapplicable by reason of Section 403(i)(1). Section 403(i)(1)(F), properly read, exempts only those subcontracts whose primes are exempt, and petitioners' prime contractors are concededly not free from renegotiation.

Petitioners seek to buttress their position by reading Section 403(i)(1)(F) as exempting from renegotiation subcontracts which were under prime construction contracts awarded as a result of competitive bidding (Pet. 7). This reading, however, ignores the fact that Section 403(i)(1)(F) is framed in the general terms of prime contracts and intermediate contracts "to which this section does not apply"; it is not designed in terms of the particular *types* of contracts, enumerated in the preceding subparagraphs of Section 403(i)(1), to which the Renegotiation Act might or might not apply, depending upon the period covered.

Finally, petitioners urge that under the construction adopted below the provision in Section 701(d) making subparagraph (F) effective as of April 28, 1942, is rendered "ineffective" and "meaningless" (Pet 9). While this argument might have some substance if subparagraphs (E) and (F) contained the only exemptions, it plainly has no validity when Section 403(i)(1), as a whole,

and Section 701(d) are read together. In addition to subparagraphs (E) and (F), Section 403(i)(1) contains subparagraphs (A) through (D), each of which describes a type of contract to which "[t]he provisions of this section [*i.e.*, the Renegotiation Act] shall not apply." Two of these subparagraphs, (C), dealing with contracts for certain agricultural commodities, and (D), dealing with contracts with tax-exempt charitable organizations, were, like subparagraph (F), made effective retroactively to April 28, 1942. Since prime contracts under subparagraphs (C) and (D) are exempt from April 28, 1942, subcontracts under such prime contracts are likewise exempt from renegotiation by virtue of subparagraph (F). Thus, although Section 403(i)(1)(F) and Section 701(d) do not operate to exempt subcontracts, such as those of petitioners, under prime contracts covered by subparagraph (E), these provisions are fully operative and meaningful for subcontracts under prime contracts falling within subparagraphs (C) and (D).

2. *The Legislative History.* The legislative history of the Second Renegotiation Act lends no more support to petitioners than do the terms of the statute. It is clear that Section 403(i)(1)(F) was made retroactive to April 28, 1942, for the specific purpose of exempting subcontracts under all automatically exempt prime contracts for the same period that the primes were exempt, whether that period began before the effective date of the Second Renegotiation Act or thereafter. Section 403(i)(1), as amended by the Second Renegotia-

tion Act, carried forward certain old exemptions of prime contracts which were effective as of April 28, 1942,[3] and Section 403(i)(1)(F) had to be made retroactive to that date if subcontracts under such exempt primes were to be themselves exempt for the entire period. Congress intended that whenever a prime contract was exempt from renegotiation a subcontract thereunder should also be automatically exempt, but there is no indication that Congress envisaged that a subcontract could be statutorily exempt if the prime contract were covered.

As originally introduced and reported by the House Committee, the bill which became the Second Renegotiation Act (H.R. 3687, 78th Cong., 1st Sess.) exempted "any subcontract, directly or indirectly under a contract or subcontract exempted from the provisions of this section, or to which this section does not apply, by reason of this paragraph" (Section 403(i)(1)(E) of H.R. 3687). This exemption of subcontracts was twofold: First, subcontracts under contracts *"exempted"* by the War Contracts Price Adjustment Board under its discretionary authority (which became Section 403(i)(4) of the Act);[4] secondly, subcontracts under

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[3] The Revenue Act of 1942 (Act of October 21, 1942) had incorporated certain exemptions, effective as of April 28, 1942. Revenue Act of 1942, Title VIII, Sec. 801(c).

[4] Petitioners claim no discretionary exemptions for their own subcontracts under Section 403(i)(4), nor any exemption at all for their prime contractors. They claim only an automatic statutory exemption for their own subcontracts under Section 403(i)(1)(F).

contracts or subcontracts "to which this section does not apply, by reason of this paragraph," *i.e.*, prime contracts automatically exempt under Section 403(i)(1) of the Act (Section 403(i)(1)(A), (B), (C), and (D) of H.R. 3687). The House Committee reported this provision favorably because "Under existing law, considerable confusion results from the fact that a subcontract may be subject to renegotiation even though the prime contract or any intermediate subcontract may not be so subject." H. Rept. No. 871, 78th Cong., 1st Sess., p. 79.

The Senate Committee deleted the language "exempted from the provisions of this section," and thus limited the exemption for subcontracts to those under prime contracts or intermediate subcontracts which were automatically exempt by reason of Section 403(i)(1). And the Senate Committee Report explicitly so states (S. Rept. No. 627, 78th Cong., 1st Sess., pp. 100-101).[5] Apparently at the suggestion of Joseph M. Dodge, Chairman of the then Joint Price Adjustment Board, that the exemption "of subcontracts under exempt prime contracts" be made effective as of April 28, 1942 (Hearings before the Senate Committee on

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[5] The Senate report says, at page 101:

"The exemption in the House bill went to contracts and subcontracts exempted from the provisions of the renegotiation section *and* to those to which that section was inapplicable by reason of paragraph (1) of subsection (i). Under the [Senate] committee bill, *the exemption is restricted to contracts and subcontracts to which the renegotiation section is made inapplicable by the paragraph.*" [Emphasis added.]

Finance, 78th Cong., 1st Sess., on H.R. 3687, p. 1075), the Senate Committee made its exemption retroactive. The reason for this provision, as we have stated (*supra*, pp. 7-8), was to insure that subcontracts attributable to fiscal years ending before June 30, 1943, under exempt primes falling in these earlier fiscal years (*i.e.*, exempt from the beginning of renegotiation) would be likewise exempt.

The Conference Committee accepted the restrictive Senate view that the only subcontracts which should automatically be exempt were those under automatically exempt primes; and it likewise adopted the Senate amendment as to the effective date of Section 403(i)(1)(F). Conference Report: H. Rept. No. 1079, 78th Cong., 2d Sess., pp. 36, 85.[6] Nothing was said in either House to bear out petitioners' curious misconstruction of the exemption provisions.

3. *The Regulations.* Section 403(i)(2) of the Act, also as amended by the Second Renegotiation Act, authorizes the War Contracts Price Adjustment Board "by regulation to interpret and apply the exemptions provided for in paragraph (1)(A), (B), (C), (E), and (F) * * *." The Board's

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[6] The Statement of the Managers on the Part of the House calls attention to the fact that the House bill exempted subcontracts under both automatically exempt and discretionarily exempted primes, and that the conference agreement "limits the exemption of such subcontracts * * * to those which are directly or indirectly under contracts or subcontracts to which the Renegotiation Act does not apply by reason of subsection (i)(1)" (*i.e.*, the statutory exemption provision). (H. Rept. No. 1079, p. 85.) No reference is made to the change in effective date of the provision.

Regulations proceed on the interpretation of Section 403(i)(1)(F) which we have stated, and provide that "A determination made with respect to the exempt or non-exempt status of the prime contract shall be controlling with respect to the exempt or non-exempt status of the subcontract." Renegotiation Regulations, adopted by the War Contracts Price Adjustment Board, March 24, 1944, Sec. 347.2, 10 Fed. Reg. 986, Sec. 1603.347-2. Thus, the renegotiating agencies' administrative practice and regulations on exemptions, specifically authorized by the Act, refute petitioners' claim. Even if the language and history of the Act left doubt, this authorized administrative practice would be conclusive.

CONCLUSION

The judgments of the courts below are in accord with the language of the Renegotiation Act, its legislative history, and the applicable regulations. There is no conflict of decisions and no need for further review. The petition for a writ of certiorari should be denied.

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JUNE 1955.

APPENDIX

Revenue Act of 1943, Act of February 25, 1944, 58 Stat. 21, 78.

Title VII—Renegotiation of War Contracts

SEC. 701. RENEGOTIATION OF WAR CONTRACTS.

(a) *Terms Used.*—Terms used in this section shall have the same meaning as when used in section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942.

(b) *Renegotiation of War Contracts.*—Section 403, as amended, of the Sixth Supplemental National Defense Appropriation Act, 1942, is amended to read as follows:

* * * * *

(i)(1) The provisions of this section shall not apply to—

(A) any contract by a Department with any other department, bureau, agency, or governmental corporation of the United States or with any Territory, possession, or State or any agency thereof or with any foreign government or any agency thereof; or

(B) any contract or subcontract for the product of a mine, oil or gas well, or other mineral or natural deposit, or timber, which has not been processed, refined, or treated beyond the first form or state suitable for industrial use; or

(C) any contract or subcontract for an agricultural commodity in its raw or natural state, or if the commodity is not customarily sold or has not

an established market in its raw or natural state, in the first form or state, beyond the raw or natural state, in which it is customarily sold or in which it has an established market. The term "agricultural commodity" as used herein shall include but shall not be limited to—

(i) commodities resulting from the cultivation of the soil such as grains of all kinds, fruits, nuts, vegetables, hay, straw, cotton, tobacco, sugar cane, and sugar beets;

(ii) natural resins, saps and gums of trees:

(iii) animals such as cattle, hogs, poultry, and sheep, fish and other marine life, and the produce of live animals, such as wool, eggs, milk and cream; or

(D) any contract or subcontract with an organization exempt from taxation under section 101(6) of the Internal Revenue Code; or

(E) any contract with a Department, awarded as a result of competitive bidding, for the construction of any building, structure, improvement, or facility; or

(F) any subcontract, directly or indirectly under a contract or subcontract to which this section does not apply by reason of this paragraph.

(2) The Board is authorized by regulation to interpret and apply the exemptions provided for in paragraph (1)(A), (B), (C), (E), and (F), and interpret and apply the definition contained in subsection (a)(7).

* * * * *

(d) *Effective Date.*—The amendments made by subsection (b) shall be effective only with respect to the fiscal years ending after June 30, 1943, except that (1) the amendments inserting subsections (a)(4)(C), (a)(4)(D), (i)(1)(C), (i)(1)(D), (i)(1)(F), (i)(3), and (l) in section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, shall be effective as if such amendments and subsections had been a part of section 403 of such Act on the date of its enactment, and (2) the amendments adding subsection (d) and (e)(2) to section 403 of such Act shall be effective from the date of the enactment of this Act.

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